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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1179

UNION TANK CAR COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA, EX REL., MOSHER STEEL COMPANY, FLUOR CORPORATION, LTD., ET AL., AND WARD INDUSTRIES CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, Union Tank Car Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on January 6, 1969.

CITATIONS AND OPINIONS BELOW.

The Arizona District Court rendered no opinion but entered findings of fact and conclusions of law which are printed in Appendix B hereto, *infra,* p. 3. The opinion of the Court of Appeals is not yet reported but is printed in Appendix B hereto, *infra,* p. 24.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 6, 1969 (Appendix B hereto, *infra*, p. 37). Petitioner filed a timely petition for rehearing which was denied on February 11, 1969, Judge Ely voting for rehearing on the issue of prejudgment interest (Appendix B hereto, *infra*, p. 38). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).[1]

QUESTIONS PRESENTED.

1. Whether a debt of a bankrupt joint venturer arising out of joint venture business constitutes a partnership debt within the meaning of Section 5 (g) of the Bankruptcy Act.

2. Whether a creditor securing a recovery out of the individual estate of a bankrupt joint venturer on the representation that its claim is an individual debt of the bankrupt, is estopped to assert in a subsequent action brought against other persons allegedly liable for the same debt, that the claim was, in fact, a joint venture and not an individual obligation.

3. When a diversity action is brought against several defendants on a contract claim for relief and one defendant is a surety for another, may the surety defendant invoke a statute of the forum state which requires a Court to make findings on the suretyship issue, and order the plaintiff to levy execution upon the property of the principal before levying on the property of the surety?

4. Where the liability of a defendant depends solely upon whether a telephone conversation three years prior

1. Petitioner is informed that respondents Ward Industries Corporation and Fluor Corporation, Ltd. and its sureties, appellants-cross appellees below, also intend to file petitions for writ of certiorari.

to trial gave rise to an oral contract, may a District Court predicate a finding on the disputed testimony of an interested party to the conversation which is in conflict with contemporaneous documents that the Court makes no effort to explain or reconcile?

5. Whether in a diversity action, a Court of Appeals may award prejudgment interest on a claim which was disputed in amount where the law of the forum state prohibits such an award because the claim is not "capable of ascertainment by mere computation" at the commencement of suit.

STATUTES INVOLVED.

The statutory provisions and rules involved are Section 5(g) of the Bankruptcy Act, 11 U. S. C. § 23, Subd. (g); Arizona Revised Statutes, Sec. 44-142, Sec. 12-1642 and Sec. 12-1646; and Rule 52(a) of the Federal Rules of Civil Procedure. They are found in Appendix A, *infra,* pp. 1, 2.

STATEMENT OF THE CASE.

This action was instituted by the plaintiff, Mosher Steel Company, to recover $321,053.54 for fabricated steel used in the construction of missile launch facilities in Arizona and California. Of this amount $298,336.58 was sought from defendants Ward Industries Corporation, Union Tank Car Company and Fluor Corporation, Ltd. and its sureties, for fabricating and delivering steel used in the Titan II, Phase II missile launch work at Davis-Monthan Air Force Base, Tucson, Arizona. The balance of $22,716.96 was sought from defendants Ward and Union for fabricating and delivering steel used in similar work at Vandenburg Air Force Base, Lompoc, California (R 1680).[2] The

2. All page references in this petition to the record will be prefixed with the letter R; all page references to the reporter's transcript will be prefixed by the letters RT.

Arizona District Court entered judgment against both Ward and Union in the amount of $268,882.92 and against defendants Fluor and its sureties in the amount of $246-165.96. The District Court found that the Mosher claim was unliquidated and denied prejudgment interest (App. B, *infra,* p. 23).

The defendants appealed and Mosher cross-appealed on the issue of prejudgment interest. The Court of Appeals affirmed the judgment against defendants but reversed on the question raised by the cross-appeal, directing that the case be remanded to the District Court for the computation and award of prejudgment interest (App. B, *infra,* p. 36).

Missile Launch Construction.

In 1961 Fluor entered into a prime contract with the United States Government for Phase II construction on the Titan II missile launch facilities at Davis-Monthan Air Force Base, Tucson, Arizona. Matich Bros. and M. M. Sundt Construction Corp., who were not parties to this litigation, had also entered into a prime contract with the Government for Phase II work on the launch facilities at Vandenberg Air Force Base, Lompoc, California.

Fluor and Matich-Sundt thereafter subcontracted portions of the construction covered by their prime contracts to Union's Graver Tank & Mfg. Co. division (Jt. Ex. 2 and 4).[3] Union, in turn, entered into a second-tier subcontract (Jt. Ex. 8) with a joint venture composed of Idaho-Maryland Industries, Inc. and Ward Industries Corporation (Jt. Ex. 7). The second-tier subcontract provided that IMI-Ward would perform a substantial part of the steel fabrication covered by Union's contracts with Fluor

3. The letters Jt. Ex. refer to joint exhibits introduced in evidence pursuant to stipulation. The remaining exhibits introduced in evidence by Mosher, Ward and Union are respectively referred to as M. Ex., W. Ex. and U. Ex.

and Matich-Sundt, including the levels 2 and 3 and blast lock fabrication actually done by Mosher. It also provided that the joint venture would indemnify and save Union harmless on any claims asserted by joint venture subcontractors and materialmen (Jt. Ex. 8).

When IMI-Ward fell behind schedule on the Davis-Monthan project, the joint venture sought to farm out part of their steel fabrication to another company. Sam A. Wilson, an IMI division superintendent, suggested Mosher as a qualified fabricator who would be acceptable to Union.[4] George Morton, manager in charge of the IMI-Ward venture, told Wilson to meet with Mosher and report back to him what it would cost to have the work done (M. Ex. 39, p. 20; RT 997).

At an ensuing October 13, 1961 meeting Wilson reviewed the proposed levels 2 and 3 and blast lock fabrication with Mosher's officers (RT 66, 71). He also told them that a Graver purchase order would be forthcoming if a satisfactory deal could be negotiated (RT 191). Mosher submitted a proposal (M. Ex. 1) on this assumption but it was rejected by joint venture manager Morton who insisted that "at no time was Mosher to deal directly with Graver in the matter of this subcontract" (M. Ex. 39, p. 33). Union also objected when it learned of the proposal because the joint venture had no authority "to commit Graver to pull their chestnuts from the fire" (U. Ex. G).

Thereafter, IMI-Ward again met with Mosher and requested it to accept a joint venture purchase order for the Davis-Monthan work discussed with Wilson and also to accept a further purchase order for about $25,000 of addi-

4. The subcontract provided that all joint venture subcontractors and suppliers were subject to Union's approval. This provision was included because a similar contractual requirement was imposed upon Union by Fluor and Matich-Sundt and upon those prime contractors by the Government (Jt. Ex. 1-4). As a result Union was necessarily consulted whenever the joint venture engaged a subcontractor or supplier (RT 506-7).

tional fabrication for Vandenberg (RT 89, 796-7). Such purchase orders were prepared and sent to Mosher on November 3, 1961 (Jt. Ex. 9 & 10). The District Court found that Mosher told IMI it would accept the orders provided Union would also agree to be responsible for payment (App. B, *infra*, p. 12).

November 15th Telephone Conversation.

On November 15, 1961, when the first steel shipment for Davis-Monthan was ready, Mosher's treasurer Moore telephoned Graver's comptroller Page and told him that Mosher "had agreed to accept IMI-Ward's purchase order" but wanted assurance "that if we were not paid within the terms of the sale that [Graver] would be responsible" (RT 269, 355). According to Page, he advised Moore that Graver "would guarantee payment right then and there over the telephone of the one shipment that was ready" but as to "the rest of it I would consider and find out what I could do and write him a letter" (RT 742, 744-7, 759). Moore, on the other hand, testified that Page had flatly promised on behalf of Graver "to pay us direct and deduct it from the [IMI-Ward] contract" (RT 362).

Despite this conflicting account of the telephone conversation, the record shows as an undisputed fact that Page sent Moore a telegram the same day which read (Jt. Ex. 22):

> "Please accept this wire as guaranty of Idaho-Maryland payment to you on your November 16 shipment. Complete details will follow in letter early next week."

A letter was subsequently drafted for consideration by Union's officers on whether to extend the telegram guarantee to cover future shipments (Jt. Ex. 21). They decided against such an extension and agreed that any future requests by Mosher should be considered on a shipment-by-shipment basis (Jt. Ex. 24). Mosher made no further requests.

Invoices Covering Mosher's Work.

Following receipt of the joint venture purchase orders, Mosher entered supplements to its shop order for the Davis-Monthan work changing the customer's name from Graver to IMI (Jt. Ex. 13, RT 92). At the same time it entered an additional shop order in the name of IMI covering the separate fabrication work on the Vandenberg project (M. Ex. 22-A, RT 100).

From that date forward Mosher regularly invoiced the joint venture on all shipments made pursuant to IMI-Ward purchase orders (Jt. Ex. 14). At no time were any invoices sent Union or its Graver division (RT 397-8). In December, 1961 IMI advised Mosher that the latter's invoices were not billed by sites and levels as required under joint venture billing procedure (R 1235). Mosher rebilled the work and sent new invoices to IMI-Ward on or about January 19, 1962 (RT 367, 381). At no time were copies of these revised invoices sent to Union or its Graver division (RT 400-1, 397-8).

While the fabrication work was under way in its shop, Mosher also accepted numerous change orders from the joint venture increasing the dollar amount of the work being done under the November 3 joint venture purchase orders (Jt. Ex. 14, U. Ex. VVV-ZZZ, RT 129, 136). Once again, Mosher never gave Union or its Graver division notice of its acceptance of the change orders and never sent Graver any invoices thereon (RT 130, 424).

While Mosher was performing the steel fabrication for IMI-Ward, the joint venture regularly invoiced Graver on a percentage of completion basis for the work covered by its second tier subcontract (RT 520-21, 550-6, U. Ex. CCCC). The joint venture assigned its invoices, including those covering blast lock and levels 2 and 3 work under Section 4 of the subcontract (RT 555, U. Ex. T-Y), to the United California Bank (R 1235, RT 593). The bank

presented these invoices to Graver and received payment thereon (U. Ex. IIII).

IMI Bankruptcy.

On February 2, 1962 IMI filed a voluntary petition in bankruptcy under Chapter XI of the Bankruptcy Act (R 1235). Mosher submitted a $321,000 proof of claim in the proceeding on the representation that the work performed pursuant to the November 3 purchase orders was an individual debt of IMI (U. Ex. D). The Referee allowed the claim and ordered 642,107 shares of IMI stock issued to Mosher as a general unsecured creditor of IMI (U. Ex. E). IMI thereafter changed its name to Allied Equities Corporation and the stock was actually issued on a 1-20 reverse split whereby Mosher received 32,105 shares of Allied stock (R 1237). The value of the stock was established by trial stipulation at $52,170.62 (R 1237).

Institution of Suit.

After allowance of its bankruptcy claim, Mosher filed its complaint in the present action, alleging that Union as well as Ward was liable to pay for the fabricated steel (R 268-80). Union filed an answer denying that it had made any agreement or promise to Mosher beyond the November 15 telegram guarantee of the first steel shipment for Davis-Monthan. It further pleaded the statute of frauds and alleged that plaintiff was estopped to assert a claim against Union after representing to the bankruptcy court that the indebtedness sued upon was an individual responsibility of IMI, thereby obtaining a distribution to which it would not otherwise have been entitled by reason of the provisions of Sec. 5 (g) of the Bankruptcy Act (R 1098-9).

Union also filed a counterclaim against plaintiff which asked that the Court determine whether a principal-surety

relationship existed between Ward and Union with respect to the Mosher claim and in the event such relationship was found to exist and Union and Ward were each held liable to Mosher, that plaintiff be compelled first to seek satisfaction of its claim from Ward as the defendant primarily responsible for payment (R 295). The counterclaim relief was sought pursuant to provisions of Sec. 12-1642 and 12-1646 of the Arizona Revised Statutes.

Findings and Conclusions.

On May 24, 1966 the District Court entered findings of fact and conclusions of law holding that "Ward, as a member of IMI-Ward, is obligated to Mosher by reason of Mosher's performance of the terms and provisions on Mosher's part contained" in the November 3 purchase orders (R 1238). It also held that Page's telephone conversation with Moore on November 15, 1961 "constituted a contract and had the legal result of obligating Union to pay Mosher for all sums becoming due to Mosher" under the terms of the November 3 purchase orders issued by IMI on behalf of the joint venture (R 1238). Finally, it held Fluor and its sureties liable to Mosher under the provisions of the Miller Act, 28 U. S. C. § 270b, because of the "direct" contractual relationship which the Court found to exist between Union and Mosher (R 1237). The Court concluded that Mosher was not barred or estopped from recovery "by reason of its prosecution of its claim in the proceedings in the matter of the bankruptcy of IMI and its acceptance of the stock issued on its claim" (R 1237).

The District Court, however, failed to dispose of Union's counterclaim when entering its initial judgment on May 24, 1966. This fact was brought to the Court's attention, whereupon the Clerk, at the direction of the Court, entered a further judgment on June 20, 1966 (R 1345) "that the defendant Union Tank Car Company take nothing by its

counterclaim." The Court made no findings of fact or conclusions of law in dismissing the counterclaim.

These rulings, except with respect to the issue of prejudgment interest, have now been affirmed by the Court below.

I.

REASONS FOR GRANTING THE WRIT.

The Decision Below With Respect To the Estoppel Defense Conflicts With the Tenth Circuit's Decision in the Eads Case.

The decision of the Court below rejecting defendants' estoppel defense based on Bankruptcy Act § 5(g) is believed to be erroneous and in conflict with the decision of the Tenth Circuit in *Eads Hide & Wool Company* v. *Merrill,* 252 F. 2d 80. In the *Eads* case the Court held that plaintiff was estopped from maintaining suit on an alleged partnership obligation where he had previously represented that his claim constituted an individual debt of a bankrupt so as to secure a distribution out of the bankrupt's individual estate. It based its decision on the provisions of Bankruptcy Act §5(g) which treats a partnership as an entity for the purpose of distributing assets and provides for the payment of partnership debts solely out of the partnership property unless a surplus remains in a bankrupt's individual estate after all individual debts are paid.

The Court reasoned that the application of estoppel principles in such situations was the only effective means to prevent creditors from shifting between inconsistent individual and partnership claim positions in order to promote private financial interests at the expense of general creditors with bona fide claims to a bankrupt's individual estate. It declared, at p. 84:

"... Where a party assumes a certain position in a

> legal proceeding and succeeds in maintaining that position he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. . . .
>
> Appellant has formerly asserted a right to share in the individual estate of a bankrupt partner on an equal basis with other individual creditors. . . . [H]aving thus declared itself to be a creditor of Chapman individually through its acceptance of dividends to the detriment of other general creditors, it must be held to be estopped to now claim that the obligation due it was a partnership obligation."

The Court below recognized the pertinency of *Eads* but sought to distinguish the decision on the ground that Mosher purported to reserve its rights against Ward, Union, and Fluor and for the further reason that Mosher would not obtain a double recovery (App. B, *infra*, p. 31). The Tenth Circuit's decision however, did not turn upon these considerations but was based on the fact the plaintiff had successfully asserted his claim to be an individual debt of the bankrupt at the expense of other creditors who thereby unjustly suffered a proportionate reduction in their recovery.

The present case actually presents a stronger basis for an estoppel because unlike in *Eads,* Mosher's attempted reservation of rights establishes that the plaintiff was aware of the inconsistency of its position at the time of the bankruptcy proceedings. Moreover, in the IMI bankruptcy the debtor in possession sought to stay a distribution on Mosher's claim pending a determination of this action (M. Ex. 30). With knowledge of its inconsistent claims, Mosher nevertheless opposed the motion and secured an immediate distribution of shares to which it unquestionably was not entitled under its present theory of recovery.

Mosher also sought to convince the Court below that a

joint venture was not a partnership within the meaning of Bankruptcy Act § 5(g). While the Court did not expressly rule on this question, other decisions have held that a joint venture is to be so regarded. *In Re Taub* (2d Cir. 1924), 4 F. 2d 993; *In Re Kessler & Co.* (D. C. N. Y. 1909), 174 Fed. 906; *Nestor* v. *Joseph* (7th Cir. 1920), 265 Fed. 264. Because of the increasing prevalence of this form of business relationship, a decision of this Court clearly fixing its partnership status would be of importance in the administration of the bankruptcy laws.

II.

THE COURT BELOW, IN AFFIRMING DISMISSAL OF UNION'S COUNTERCLAIM, HAS DENIED PETITIONER EQUITABLE RELIEF CONTRARY TO ARIZONA LAW.

Union's counterclaim against Mosher sought equitable relief pursuant to Arizona Revised Statutes, §§ 12-1642 and 12-1646. Section 12-1642 provides that where a suit is brought against two or more defendants on a cause of action and one of the defendants claims to be a surety for the others, the defendant so claiming may have the surety issue tried by the Court. It further provides that if the defendant is found to be a surety, the Court shall order that any judgment rendered shall be enforced first from the assets of the principal before resorting to the property of the surety. Section 12-1646 further provides that the remedy made available to the surety exists regardless of whether the principal-surety relation is created by express contract or operation of law.

The District Court held that the counterclaim stated a claim upon which relief could be granted (R 1688) but nevertheless dismissed the same after trial without ruling on the suretyship issue or entering any findings of fact

or conclusions of law thereon. The Court below in affirming states (App. B, *infra*, p. 32):

> ". . . It is apparent to us that the trial court rejected Union's counterclaim because it found Union's relationship to the debt to be that of a direct obligor, not a surety . . . [A]s we have said, the trial court's finding that Union agreed to a direct and primary obligation is not clearly erroneous."

The Court below thereby credits the District Court with having made an implied finding based on the erroneous legal conclusion that once Union was found to be a direct and primary obligor liable to pay one and the same debt as Ward, petitioner was necessarily precluded from obtaining the statutory relief prayed for in its counterclaim.

Contrary to the Court's view, existence of the requisite surety relation for the purpose of the counterclaim does not depend upon the capacity in which Union and Mosher contracted with each other. It rather depends upon the relationship between Union and Ward. As co-obligors, Union and Ward may be found to have direct and indistinguishable obligations to Mosher; yet under established equitable priniciples of suretyship, if the relation between them requires that Ward rather than Union pay their common debt to Mosher, then a surety relation exists which Mosher must take into consideration in seeking satisfaction.

These principles were previously recognized by the Court below in *Howell* v. *War Finance Corporation* (9th Cir., 1934), 71 F. 2d 237, 243:

> ". . . 'The obligation of the surety may be indirect that another shall perform or direct that he will perform himself; he may be jointly bound or appear on the face of the writing as the sole debtor without his being on that account less a surety, or losing the equitable rights which belong to him in that capacity.' "

* * * * *

> "... 'It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two different capacities—as is often the case ... The relation is fixed by the arrangement and equities between the debtors or obligors ...' "

The identical equitable principles also find expression in the *Rest., Security* § 82 where suretyship is defined as "the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform." See also *Rest. Security* § 114 Comment a; *Rest. Contracts* § 92 Comment a, § 180 Comment e; 10 *Williston on Contracts* (3rd Ed. 1967) § 1211.

While these equitable principles have been codified in the statute law of Arizona, the Court below obviously gave no consideration to them because of its erroneous view of the law. But for this misconception we believe that the District Court's counterclaim decision would have been reversed and the requisite surety relation would necessarily have been found to exist between Union and Ward. The IMI-Ward subcontract required Ward as a joint venturer to perform the steel fabrication completed by Mosher. It further provided that the joint venturers would hold Union harmless from claims arising from the performance of work or furnishing of materials thereunder. Evidence was also introduced showing that Mosher was aware of the relationship between Union and IMI-Ward, that Union paid the joint venture for the work Mosher performed, and that after collecting neither Ward nor IMI paid the plaintiff in this case.

This was all the proof required to entitle petitioner to the relief clearly provided for under the provisions of Arizona

Revised Statutes Sec. 12-1642. Such relief is nevertheless denied because the Court below has given the statute a strict and narrow interpretation in conflict with its evident equitable purpose and intent.

III.

THE COURT BELOW, IN AWARDING MOSHER PREJUDGMENT INTEREST, HAS DECIDED AN IMPORTANT QUESTION IN CONFLICT WITH ARIZONA LAW.

It is uniformly agreed that when the jurisdiction of a United States court is based upon diverse citizenship, the law of the forum state is controlling on the allowance of prejudgment interest. See, *e.g.*, *St. Clair* v. *Eastern Air Lines, Inc.* (2nd Cir., 1962), 302 F. 2d 477. In the present case Mosher sued for $321,053.54 but recovered a judgment for only $268,882.92. Defendants obviously disputed the amount of plaintiff's claim as well as the matter of liability. The actual amount was only determined during the course of trial when plaintiff's counsel failed to produce admissible evidence as to the value of the IMI stock received on its bankruptcy claim whereupon the District Court induced the parties to arrive at a stipulated value to overcome this failure in proof (RT 449, 681).

While the District Court recognized Mosher's claim to be unliquidated, the Court below reversed this decision on the ground that the stipulation had the effect of liquidating the claim. It thereby holds that the defendants are subject to a substantial additional liability only by virtue of the act of their counsel in entering into a trial stipulation. This result is not only grossly inequitable but in square conflict with the law of Arizona which holds that prejudgment interest will not be allowed unless the amount of plaintiff's claim is "capable of ascertainment by mere

computation'' at the institution of suit. *U. S. F. & G. Co.* v. *Calif.-Ariz. Const. Co.*, 21 Ariz. 172, 186 Pac. 502; *Schwartz* v. *Schwerin*, 85 Ariz. 242, 336 P. 2d 144.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

The Statutes and Rules involved are:

Section 5(g) of the Bankruptcy Act, 11 U. S. C. § 23, subdivision (g), which provides:

> "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each general partner to the payment of his individual debts. Should any surplus remain of the property of any general partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be distributed among the individual partners, general or limited, or added to the estates of the general partners, as the case may be, in the proportion of their respective interests in the partnership and in the order of distribution provided by the laws of the State applicable thereto."

Arizona Revised Statutes § 44-142 which provides:

> "*Actions against persons primarily and secondarily liable on bill of exchange or other contract.* The acceptor of a bill of exchange, or any other principal obligor on any contract may be sued either alone or jointly with any other party who may be liable thereon, but judgment shall not be given against such other party not primarily liable unless judgment has been previously or is at the same time, given against the acceptor or other principal obligor, except when the plaintiff discontinues his action against such principal obligor."

Arizona Revised Statutes § 12-1642 which provides:

> "*Determination of issue between principal and*

surety; and order of levy. A. When an action is brought against two or more defendants upon a contract, and one or more of the defendants are surety for the others, the surety may cause the issue of suretyship between the defendants to be tried and determined at any time before the trial, but such proceedings shall not delay the action of the plaintiff. B. If the issue is determined in favor of the surety, the court shall order the sheriff to levy the execution first upon the property of the principal which is subject to execution and situate in the county in which the judgment was rendered before a levy is made upon the property of the surety, if enough property of the principal is found as in the opinion of the sheriff or constable is sufficient to make the amount of the execution, otherwise the levy shall be made on so much property of the principal as is found, if any, and upon so much of the property of the surety as is necessary to make the amount of the execution. The clerk shall make a memorandum of such order on the execution."

Arizona Revised Statutes § 12-1646 which provides:

"The remedy provided in this article for sureties extends to endorsers, guarantors, drawers of bills which have been accepted, and every other suretyship, whether created by express contract or operation of law."

Rule 52(a) of the Federal Rules of Civil Procedure which provides in pertinent part:

". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ."

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the District of Arizona.

UNITED STATES OF AMERICA for the use and benefit of MOSHER STEEL COMPANY, and MOSHER STEEL COMPANY, *Plaintiffs,* *vs.* THE FLUOR CORPORATION, LTD., et al., *Defendants.*	No. Civil-1605 Tucson

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR ENTRY OF JUDGMENT.

This action having been tried upon the facts before the Court, sitting without a jury, the Court does hereby find the facts and states separately its conclusions of law thereon, and directs entry of judgment, as follows:

FINDINGS OF FACT.

1. Use-plaintiff, Mosher Steel Company (hereinafter "Mosher", is and was at all times material herein a corporation and a citizen of Texas. Defendant Fluor Corporation, Ltd., (hereinafter "Fluor"), is and was at all times material herein a corporation and a citizen of California. Defendants Federal Insurance Company, Vigilant

Insurance Company, Insurance Company of North America, General Insurance Company of America, Seaboard Surety Company, America Re-Insurance Company, Employees' Re-Insurance Group, and General Re-Insurance Group (hereinafter "Sureties"), are and were at all times material herein respectively corporations and citizens of states other than Texas or Arizona. Defendant Union Tank Car Company (hereinafter "Union"), is and was at all times material herein a corporation and a citizen of New Jersey, having a principal place of business in Illinois. Graver Tank and Mfg. Company (hereinafter "Graver"), is and was at all times material herein a division of Union and not a separate entity. Defendant Ward Industries Corporation (hereinafter "Ward"), is and was at all times material herein a corporation and a citizen of Delaware, having a principal place of business in New York, and is sued herein by Mosher as a member of a Joint Venture composed of Ward and Idaho-Maryland Industries, Inc., (hereinafter "IMI"). None of the defendants at any time material herein had a principal place of business in either Texas or Arizona.

2. All acts, conduct, and documents of Graver, or relating to Graver, mentioned or described in these Findings are the acts, conduct, and documents of Union and relate to Union. The terms "Graver" and "Union" are interchangeable and both refer to and mean defendant "Union". (Statement of Uncontested Facts, ¶ 3.)

3. The matter in controversy between Mosher and defendants exceeds $10,000, exclusive of interest and costs; and Mosher's claim against defendants Fluor and Sureties, asserted in Count I of Mosher's Amended Complaint, is asserted under the Miller Act. (40 U. S. C. §§ 270a, et seq.)

4. The United States of America entered into a written contract dated May 29, 1961, with Fluor, whereby Fluor agreed to perform work and to furnish services, labor,

equipment, and materials for the construction of certain missile launch facilities near Davis-Monthan Air Force Base, Tucson, Arizona. (Jt. Ex. 1 in evidence.)

5. In connection with the Davis-Monthan job (the contract described in Finding No. 4), defendants Fluor and Sureties executed a payment bond. (Jt. Ex. 49 in evidence.)

6. The United States of America entered into a written contract dated May 29, 1961, with Matich Bros. and M. M. Sundt Construction Corp., whereby Matich and Sundt agreed to perform work and to furnish services, labor, equipment and materials for the construction of certain missile launch facilities near Vandenberg Air Force Base, Lompoc, California. (Statement of Uncontested Facts, ¶ 10.)

7. On September 8, 1961, Fluor entered into a written subcontract with Union, acting by and through Graver, whereunder Union agreed to perform certain of the work and to supply certain of the labor, materials, and other items provided in Fluor's prime contract described in Finding No. 4 to be performed and supplied by Fluor upon the Tucson project. (Jt. Ex. 2 in evidence.)

8. On September 8, 1961, Matich Bros. and Sundt entered into a written subcontract with Union, acting by and through Graver, whereunder Union agreed to perform certain of the work and to supply certain of the labor, materials, and other items provided in Matich Bros. and Sundt's prime contract described in Finding No. 6 to be performed and supplied by Matich Bros. and Sundt upon the Vandenberg AFB project. (Jt. Ex. 4 in evidence.)

9. On or about July 14, 1961, a document (Union Ex. 4 in evidence) captioned "Letter of Intent Preparatory to Formal Agreement" was executed by and between IMI and Ward, wherein Ward and IMI expressed their intention as more particularly specified in the document, to execute a joint venture agreement for the performance of

work on a proposed subcontract to IMI under a letter of intent from Union. (Statement of Uncontested Facts, ¶ 13.)

10. On July 28, 1961, IMI and Ward executed a document (Union Ex. B in evidence), captioned "Joint Venture Agreement". (Statement of Uncontested Facts, ¶ 14.)

11. Thereafter, and prior to October 23, 1961, with Union's approval, IMI and Ward executed and entered into, as of July 28, 1961, a revised Joint Venture Agreement (Jt. Ex. 7 in evidence), creating the joint venture to be known as, and hereinafter referred to as "IMI-Ward".

12. On October 23, 1961, defendant Union, acting through Graver, entered into a written subcontract with IMI-Ward (Jt. Ex. 8 in evidence), under the terms of which IMI-Ward undertook and agreed to perform certain of the work and supply certain of the materials and other items provided in Union's subcontracts described in Findings Nos. 7 and 8, above, to be performed and supplied by Union upon the Tucson project and the Vandenberg AFB project. (Jt. Exs. 2 and 4 in evidence.) The subcontract price provided in Jt. Ex. 8 in evidence to be paid to IMI-Ward is the sum of $8,525,011.00, of which sum $7,971,293.00 is applicable to work of IMI-Ward at the Tucson job and the balance of $553,718.00 is applicable to the work at the Vandenberg AFB project.

13. Mosher brings this action against defendants Union, Ward, Fluor, and Sureties for $298,336.58, which it claims is owing to it for fabricating certain steel, for furnishing certain steel, and for freight charges relating to the delivery of steel, which steel was used and incorporated into the work at the Tucson project covered by Fluor's contract (Finding No. 4, Jt. Ex. 1 in evidence), Union's subcontract (Finding No. 7, Jt. Ex. 2 in evidence), and IMI-Ward's subcontract (Finding No. 12, Jt. Ex. 8 in evidence);

and Mosher seeks in this action, also, to recover from defendants Union and Ward the sum of $22,716.96, which it claims is owing to it for fabricating and furnishing steel and for freight charges in connection with delivering steel, which steel was used in and incorporated into the work at the Vandenberg AFB project covered by Matich Bros. and Sundt's contract (Finding No. 6), Union's subcontract (Finding No. 8, Jt. Ex. 4 in evidence), and IMI-Ward's subcontract. (Finding No. 12, Jt. Ex. 8 in evidence.)

14. The revised Joint Venture Agreement (Jt. Ex. 7 in evidence) entered into between IMI and Ward expressly provides, *inter alia,* that the obligations of the joint venturers under the subcontract with Union (Jt. Ex. 8 in evidence) shall be joint and several; that all money, equipment, materials, supplies and other property of any nature whatsoever required for or in connection with the performance of the IMI-Ward subcontract shall be held for the account of the joint venture; that their interests in any profits and their respective shares in any losses and liabilities that may result from the prosecution and completion of the work to be performed under and in connection with the subcontract with Union (Jt. Ex. 8 in evidence), and their interests in all property and equipment required by the Joint Venture in connection with such subcontract, shall be 50% each; that a Joint Venture Committee is established which shall have control of the Joint Venture and shall manage its affairs, determining all matters and questions in connection with IMI-Ward's performance of the subcontract with Union; that, subject to the control of the Joint Venture Committee, performance of the work required to be done under the sub-contract with Union shall be under the supervision of George J. Morton, Manager, whose authority to commit or bind IMI-Ward shall be limited to commitments related to the normal performance of the subcontract with Union; that IMI shall

directly manage and be responsible to the Joint Venture for the production and installation of the work to be performed under the subcontract with Union, except that the Joint Venture Committee may assign the performance of other minor portions of the work to Ward, it being the intention of the parties that the work shall primarily be performed by IMI in facilities owned or operated by it; and that work and services performed by either IMI or Ward shall be done on the basis of the assumption and reimbursement by the Joint Venture of the actual cost of such work, including overhead and general administrative expenses, but without profit.

15. At all times material herein, Denver Steel and Iron Works (hereinafter "D. S. I.") was a division of IMI (Ward Exs. A-1 through A-4 in evidence).

16. In June 1961, at a meeting held in Union's offices in Chicago, Sam Wilson, General Manager of D. S. I., was instructed by officers of Graver, including its president and Vice-President, as to a procedure which would be utilized in procuring raw steel on behalf of Graver for use in performing Graver's subcontract on the Tucson and Vandenberg AFB projects, under which procedure Wilson would negotiate for the steel with steel companies and advise the companies, when agreement as to price and delivery had been reached, that Graver's purchase order for the steel would be forthcoming. (RT 222, 231.)

17. Pursuant to such procedures, Sam Wilson arranged for the purchase of raw steel to be fabricated under the IMI-Ward subcontract with Union. In the negotiations with the steel mills, Wilson always negotiated on the basis, and so advised the mills, that Graver would issue the purchase order for the steel. (RT 181, 222, 231.)

18. Prior to October 13, 1961, George Morton, Manager of IMI-Ward, was told by officers and employees of Graver

that IMI-Ward was not on schedule and that Morton would have to expedite the subcontract work. (Morton Dep., Plt's. Ex. 39 for identification, pp. 11-13.)

19. The raw steel which was originally intended to be fabricated by IMI-Ward at D. S. I. was owned by Graver. (RT 181; Jt. Ex. 8 in evidence, ¶ 5, p. 4.)

20. Lionel Lancaster, Graver's Vice-President, on October 10 or 11, 1961, at Denver, instructed Sam Wilson of D. S. I., who was having problems completing steel fabrication in time to meet delivery requirements under IMI-Ward's subcontract with Graver, to farm out the fabrication of the raw steel to others in order to meet delivery (RT 185-6); and he further advised Wilson that if he should negotiate a satisfactory contract with Mosher for the fabrication, a Graver purchase order to Mosher would be forthcoming. (RT 188, 234). At this time, Wilson told Lancaster and Thomas D. Harle, Graver's Director of Purchases, that he didn't believe Mosher would accept an IMI purchase order and that he, Wilson, desired to give Mosher a Graver purchase order. Lancaster advised Wilson that a Graver purchase order would be forthcoming. (RT 187-188, 233.) Harle and Lancaster approved of Wilson's selection of Mosher as a fabricator. (RT 233.)

21. Wilson went to Texas and on October 13, 1961, on behalf of Graver, negotiated with Mosher the complete terms, prices, and conditions of a contract for Mosher to fabricate steel required for the Tucson project (RT 193-4), advising Mosher that a Graver purchase order would be issued to cover the work. (RT 74, 187). The matters agreed upon by Wilson and Mosher were reduced to writing by Mosher on October 16, 1961. The writing was signed by Mosher's Senior Contracting Engineer and transmitted to Wilson at Denver, who signed it on behalf of Graver on October 20, 1961. Thereafter, Wilson mailed the executed writing to Mosher, who received it on October 26, 1961

(Plt's. Ex. 1 in evidence; RT 194). Wilson sent copies of Plt's. Ex. 1 to IMI at Los Angeles and Tucson, and to Graver at Tucson; and Wilson handed a copy of Plt's. Ex. 1 to Harle at Denver. (RT 194). Upon Wilson's return to Denver and before he received the October 16 letter (Plt's. Ex. 1 in evidence), Wilson told Harle of the agreement he had reached with Mosher's Burton and Mitchell at Dallas. (RT 235.)

22. On October 13, 1961, Wilson knew the credit reputation of IMI and felt the same would not be satisfactory to Mosher. (RT 191.) Mosher would not have accepted a purchase order on the credit of IMI because of its impaired credit rating known to Mosher from credit reports in its possession. (RT 438; Jt. Exs. 52 through 58 in evidence.)

23. On October 13, 1961, Mosher, through its Treasurer, Russell Moore, accepted the order placed by Wilson on that date to fabricate steel for Graver, and Mosher's shop order 66109 was marked open on October 17, 1961, showing Graver as the customer. (RT 351; Jt. Ex. 12 in evidence.)

24. Mosher, considering itself bound, began performance under the October 13, 1961, oral agreement and expended labor for engineering between October 18 and October 24, 1961. (RT 251.) Mosher's shop started making templates on October 23, 1961. Steel began to arrive in Houston from Graver on October 23, 1961, in railroad cars sent, freight collect, by Graver. (RT 285, 286.) Up to November 16, 1961, Mosher had incurred in excess of $40,000 in costs for shop work, overhead and costs of fabricating Graver steel, including inbound freight. (RT 287.)

25. Harle, Graver's Director of Purchases and Expeditor for the Tucson job, telephoned Ralph Burton, Mosher's Vice-President on October 19, 1961, and arranged to meet with Burton at Denver on October 23, 1961. (RT 253.) At that meeting, the parties discussed the October 16 letter

(Plt's. Ex. 1 in evidence) in detail, Harle advising Burton that Graver would issue its purchase order to Mosher within two to three weeks and that the October 16 letter would serve as an interim purchase order until a formal purchase order could be sent by Graver. Harle also advised Burton that Wilson had signed Plt's Ex. 1 in evidence and had returned it to Mosher at Dallas. (RT 253-258.) As Director of Purchases, Harle possessed and exercised authority to issue purchase orders for Graver. (RT 905.)

26. On October 19, 1961, Mosher received from Harle a written procedure of Union's regarding shipments of steel to Mosher. This document referred to Mosher's order No. 66109, the same number carried on the October 16 letter. (Jt. Ex. 60; Plt's. Ex. 1 in evidence.)

27. Prior to October 23, 1961, Harle had directed that raw steel be forwarded from D. S. I. to Mosher at Houston and that other steel be sent from the steel mills to Mosher at Houston. (RT 254, 285-286; Jt. Ex. 60 in evidence.) This steel was owned by Graver and was stenciled "Property of Graver Tank & Mfg." (RT 181, 905.)

28. Although prior to October 31, 1961, Union's Vice-President Lancaster, Director of Purchases Harle, and Senior Contract Engineer Branting knew that Wilson had undertaken to contract on behalf of Graver for Mosher to fabricate steel for the Tucson job and knew of the contents of Plt's. Ex. 1 in evidence (RT 253-258; Jt. Ex. 60 in evidence; Union Ex. G in evidence), no officer or employee on behalf of Union ever questioned with either Wilson or Mosher, Wilson's conduct in acting on behalf of Graver. (RT 199-200.) However, the Graver purchase order which Wilson had assured Mosher would be forthcoming (Finding No. 21) and which Harle had informed Mosher would be issued to it (Finding No. 25), never was issued or delivered to Mosher.

29. On October 31, 1961, Wallace Orr, Director of Contracts for IMI-Ward, and W. E. Holmes, Manager of Construction for IMI-Ward, by direction of George Morton, IMI-Ward Manager, came to Texas for the purpose of negotiating a contract between IMI-Ward and Mosher for the fabrication of steel to be used in the Tucson and Vandenberg AFB jobs. (RT 791.) During negotiations with Burton and Mitchell of Mosher, Holmes and Orr talked of ordering steel fabricated for the Vandenberg AFB job and asked if Mosher would change the Customer on the steel job which Wilson had negotiated in Graver's name (Plt's. Ex. 1 in evidence) from Graver to IMI-Ward, explaining that it would make matters much easier and simpler for them from an accounting standpoint if Mosher accepted the change and accepted an IMI-Ward purchase order. (RT 261-265.) Holmes and Orr stated that if the change could be made, IMI-Ward would be the customer and they furnished IMI-Ward's address. (RT 88.) Holmes and Orr were told by Mitchell and Burton that only Russell Moore, Treasurer of Mosher, at Houston, could give approval for the requested change. Burton reached Moore by telephone and Moore stated that IMI-Ward would be accepted as purchaser provided Graver would be responsible for payment, which statement Burton passed on to Holmes and Orr. (RT 90, 264-265, 354.) Holmes and Orr stated they would look further into the matter and let Mosher know. (RT 90.)

30 Following his return to California from Texas, Orr caused the purchase orders which are Jt. Exs. 9 and 10 in evidence to be prepared by Frank J. Wright, purchasing man for IMI-Ward, and sent to Mosher. (RT 796-798, 863.) The purchase orders were received by Mosher in Dallas on November 10, 1961. At the time Wright prepared and signed the purchase orders, there were in existence no IMI-Ward purchase order forms and Wright utilized IMI

purchase order forms intending to obligate IMI-Ward. (RT 825-826, 798.) Mosher did not enter any change in its shop order for the Tucson job nor did it enter any shop order for the Vandenberg job until November 16, 1961. (RT 90-93.) Mitchell, Mosher's Senior Contracting Engineer, held the purchase orders (Jt. Exs. 9 and 10 in evidence) on his desk in Dallas until November 16, 1961, when he transmitted them to Mosher's main office in Houston, where they were received on November 17, 1961.

31. On November 7, 1961, Harle, Graver's Director of Purchases, was in the Mosher offices in Houston and was told by Moore, Mosher's Treasurer, that he would not release shipments of the steel which Mosher was fabricating until Mosher received confirmation that Graver would be responsible for payment for the material. (RT 354-355.) Harle suggested to Moore that he should get in touch with the person who could give assurance of payment, John Page, Graver's Controller, in Chicago, and Harle reached Page by telephone and informed him of Mosher's requirement in order to release the steel shipments. Moore also talked to Page and told him that the steel would be shipped to the missile sites only upon an agreement that if Mosher was not paid within the terms of the sale, then Graver would have to be responsible for paying Mosher. (RT 355.) Page advised Moore that approval for carrying out Moore's request would have to be sought from Morton, Manager of IMI-Ward, and Page told Moore that he would get in touch with Morton and advise Moore of the result. (RT 356.)

32. Prior to this time, Page had learned that Mosher was demanding a guarantee by Graver of the entire account and had talked with Vernon John of IMI-Ward about it, Page telling John that a guarantee would be considered only on the written request of John which must include an agreement that any payment by Graver to

Mosher could be withheld from IMI-Ward. (Union Ex. K in evidence.)

33. On November 13, 1961, Orr of IMI-Ward telephoned Moore and requested Moore to accept a purchase order solely on the credit of IMI-Ward. When Moore refused, Morton, IMI-Ward Manager, got on the phone and made the same request, which was also rejected by Moore. Moore advised Morton to contact Graver's Controller Page to get Page's approval for Graver's paying Mosher for its work, and Morton stated that if these were Mosher's conditions he would have to give his approval to Page. (RT 357-360.)

34. On November 13, 1961, Vernon John, for IMI-Ward, addressed a letter to Page, Graver's Controller, authorizing Graver to pay Mosher's invoices which would approximate $225,000, after acceptance of Mosher's work by IMI-Ward, and to deduct the amounts of such payments from the total IMI-Ward subcontract price for its work on the Tucson and/or Vandenberg AFB sites. (Jt. Ex. 26 in evidence.) Page had requested John to write him a letter of this nature. (RT 737-738.) John's letter was not received in Page's office until December 11, 1961, by which date Page had left his office permanently; but Harle, Graver's Director of Purchases, was shown a copy of the letter in IMI-Ward's California offices by Frank Wright of IMI-Ward on November 14, 1961. (RT 902.) On December 6, 1961, Harle wired Frank Wright that John's letter had not been received by Graver and asked that John mail immediately a duplicate of the letter, dated November 13, 1961. (Jt. Ex. 25 in evidence.)

35. On November 15, 1961, Moore telephoned Page in Chicago and Page informed him that a clearance had been obtained from Morton for Graver's paying Mosher directly and informed Moore that Graver would make payment to Mosher directly, with deduction being made from

the IMI-Ward contract. Page advised Moore, also, that he would write Moore a letter to this effect. (RT 360-362.)

36. On November 15, 1961, and prior to the telephone conversation between Moore and Page, Harle sent Page a TWX (Jt. Ex. 45 in evidence) and had also talked with Page by telephone, with the result that Page had informed him that Page would take care of the problem relative to the credit. (RT 913.) On the same day, Harle wrote a letter to Burton, of Mosher, stating that the letter from Page should be in Moore's hands on November 15 or November 16. In his letter to Burton, Harle gave specific instructions to Mosher regarding how the doing of the steel fabrication work and its delivery should be accomplished. (Jt. Ex. 50 in evidence.)

37. Prior to Page's conversation with Moore on November 15, 1961, Harle had informed Page that Mosher sought a guarantee of the whole account and that Page would have to resolve this problem. (RT 756-757.) When talking to Moore on November 15, 1961, Page knew that Mosher was requiring that Graver assure payment of the entire account. (RT 751-754.)

38. Following his telephone conversation with Moore on November 15, 1961, Page sent Mosher a telegram stating: "Please accept this wire as a guarantee of Idaho-Maryland payment to you on your November 16 shipment. Complete details will follow in letter early next week." (Jt. Ex. 22 in evidence.) When Page informed Moore on the telephone that he would write a letter (Finding No. 35), he intended Moore to understand that the letter was to relate to the entire fabrication job, not just the first shipment. (RT 746-748, 752.) By the letter mentioned in the second sentence of the November 15 telegram to Moore (Jt. Ex. 22), Page intended Moore to understand that the letter would be one concerning the entire acount. (RT 750.)

39. On November 16, 1961, by authorization of Moore, Mosher's Treasurer, Mitchell entered the supplements required to Mosher's shop order 66109 to change the customer's name on the order from Graver to IMI, with credit on the order marked "Open" and shipments to be made to Graver at Tucson. At the same time, Mitchell also entered shop order 66146 to IMI to cover the fabrication of the Vandenberg work. (RT 92-93; Jt. Exs. 13 and 79 in evidence.) By reason of Moore's telephone conversation with Page on November 15, 1961, and the telegram from Page of that date, Moore understood and had reason to understand that Graver would pay Mosher directly for all the work described in Jt. Exs. 9 and 10 in evidence. Moore authorized the supplement to shop order 66109 and the entry of shop order 66146 by reason of that understanding; and he permitted the release and shipment of the steel fabricated by Mosher pursuan to Jt. Exs. 9 and 10 upon that understanding. Had it not been for Page's statement to Moore on November 15 and Page's telegram of November 15, Mosher would not have accepted either IMI or IMI-Ward as its customer and it would not have proceeded with the work pursuant to Jt. Exs. 9 and 10 in evidence.

40. In agreeing to pay Mosher directly, Graver, through Page, acted primarily to protect and advance its own interests under its subcontracts with Fluor and Matich Bros. and Sundt (Jt. Exs. 2 and 4), because it had a definite stake in seeing to it that the fabricated steel came to the Tucson and Vandenberg sites.

41. After November 16, 1961, pursuant to the terms of Jt. Exs. 9 and 10 in evidence and to Graver's agreement to pay Mosher directly, Mosher fabricated the material described in Jt. Exs. 9 and 10 and delivered it to the Tucson and Vandenberg jobs. Graver supplied 1200 tons of the steel which Mosher fabricated for the Tucson job and 90 tons of the steel which Mosher fabricated for the

Vandenberg job. In addition, Mosher supplied from its own stock 165 tons of steel which it fabricated for the two jobs. In connection with the fabrication and delivery of this steel, Mosher expended $18,054.35 for inbound freight charges on steel shipped to it freight collect by Graver and $46,066.92 for outbound freight charges. (Jt. Exs. 9 and 10 in evidence; RT 287, 377-379, 905.) Computed in accordance with the prices and terms contained in Jt. Exs. 9 and 10 in evidence, Graver's charges and invoices for the steel fabricated and delivered to the Tucson job totalled $298,336.58 and for the steel fabricated and delivered at the Vandenberg site $22,716.96. (Jt. Ex. 14 in evidence.)

42. Pursuant to the purchase orders which are Jt. Exs. 9 and 10 in evidence, Mosher furnished items of work which were required to be furnished by IMI-Ward under its subcontract with Graver. (RT 555.) The prices provided in Plt's. Ex. 1 in evidence and Jt. Exs. 9 and 10 in evidence to be paid to Mosher for doing the steel fabrication were lower than the prices which IMI-Ward quoted to Graver in bidding for the subcontract with Graver. (RT 242-243.)

43. IMI had no subcontract from IMI-Ward to perform, in its own behalf, any of the work contemplated by the IMI-Ward subcontract with Mosher (RT 677; Union Ex. CCC-1 for identification, pp. 136-139; Jt. Ex. 7 in evidence); and the work IMI did on the Tucson and Vandenberg sites was performed solely pursuant to the Joint Venture Agreement. (Jt. Ex. 7 in evidence.) Mosher, in all its acts and dealings with regard to, or pursuant to, Jt. Exs. 9 and 10 in evidence understood and acted upon the belief that the purchaser or other contracting party was IMI-Ward.

44. In the first few days of December 1961, Page left his office with Graver in Chicago and never returned to it, his employment with Graver being terminated on December 12, 1961. (RT 740; Plt's. Ex. 36 for identification, p. 348.) However, when Page was terminated, other officials of

Graver, including Feurt, Manager of Construction Accounting, and Trytten, Acting Controller, knew of the existence of IMI-Ward's letter to Page authorizing Graver to pay Mosher's invoices (Jt. Ex. 26 in evidence), and knew that Page had informed Moore that Graver would make payment directly to Mosher and that Page would write Moore a letter to this effect. They knew, also, that Mosher was going ahead on the work described in Jt. Exs. 9 and 10 in evidence in reliance upon its understanding from Page's assurance on the telephone and his telegram that Graver would pay Mosher directly for all the work described in Jt. Exs. 9 and 10 in evidence. In fact, immediately after Page was terminated, these officials began the preparation of procedures for the direct payment to Mosher of its invoices and they drafted a letter such as Page had promised Moore he would write, to be sent to Mosher guaranteeing payment of all amounts which should become due to Mosher for steel furnished to IMI-Ward for the Tucson and Vandenberg jobs. (Plt's. Ex. 36 for identification, pp. 450, 451; Jt. Ex. 24 in evidence; Jt. Ex. 21 in evidence.) The letter (Jt. Ex. 21 in evidence) was never executed or sent to Mosher because Lancaster, Graver's Vice-President, pointed out that Mosher was proceeding with the steel shipments and suggested that the matter of a written guarantee be deferred until it was requested by Mosher and then be given on a "separate shipment basis." (Jt. Ex. 24 in evidence.)

45. After the execution of the subcontract between Union and IMI-Ward (Jt. Ex. 8 in evidence), IMI-Ward assigned all invoices arising out of the subcontract to the United California Bank at Los Angeles, California. Notice of such assignment was given to Union and a copy of the assignment was recorded in the office of the County Recorder of Los Angeles County, California (Union Exs. MM and KK in evidence); however, there is no evidence in the

record that Mosher was given or ever obtained from any source prior to the institution of this action, notice of the assignment.

46. In December 1961, Frank Wright, Purchaser for IMI-WARD, advised Moore, of Mosher, that Mosher's invoices theretofore issued to IMI-Ward were not billed by sites and levels. Mosher then rebilled and sent new invoices to IMI-Ward, completing this task on January 19, 1962. (RT 366-367.)

47. On February 2, 1962, IMI filed a voluntary petition under Chapter 11 of the Bankruptcy Act in the United States District Court, Southern District of California, Central Division, No. 137024-WB. On February 5, 1962, IMI, as the debtor in possession of its assets, filed an application to turn over possession of a certain manufacturing facility which it owned in Tucson, Arizona, to Graver under certain letter agreements dated February 1, 1962, and February 5, 1962. (Statement of Uncontested Facts, ¶ 17.)

48. The letter agreements of February 1 and February 5, 1962, were approved by the Referee in Bankruptcy on February 5, 1962, and IMI was authorized to accept Graver's offer in the letter agreement of November 5, 1962, and to turn over its Tucson facility to Graver. (Statement of Uncontested Facts, ¶ 18.)

49. Mosher's charges for work performed pursuant to Jt. Exs. 9 and 10 in evidence and delivered after February 2, 1962, are in the approximate sum of $55,000. (RT 384.)

50. Union caused to be prepared for presentation to the Referee in Bankruptcy in the IMI Chapter 11 proceedings, certain documents (Union Exs. ZZ, NNNN and PPPP in evidence) relating to Union's claim against IMI. The documents relate to the Tucson job and to the status, as of February 2, 1962, of the work subcontracted by Union to IMI-Ward. (RT 625-627.)

51. On March 20, 1962, Mosher sent to Fluor, by registered mail, the original of the letter and the statements and invoices which are part of Plt's. Ex. 24 in evidence.

52. In August, 1962, Mosher filed its proof of claim in the Chapter 11 proceedings of IMI, claiming that the debtor, IMI, was indebted to it for $22,716.96 for steel fabricated and delivered and furnished at Vandenberg and for $298,336.58 for steel fabricated, delivered and furnished at Tucson. The claim was filed as an unsecured claim, as qualified in paragraph 10 thereof, wherein Mosher alleged that Ward, as joint venturer with IMI, Union, and Fluor and its sureties were also liable to Mosher for the entire debt of $321,053.54, and that the filing of the claim was without prejudice to its rights against Ward, Union, and Fluor and its sureties. (Union Ex. E in evidence.)

53. On December 31, 1963, the Referee, pursuant to a plan of arrangement, ordered issued to Mosher in settlement of its claim against the debtor, IMI, certificates for 642,107 shares of IMI stock. (Union Ex. D in evidence.) Thereafter, IMI changed its name to Allied Equities Corporation and the stock was actually issued in a 1 to 20 "reverse split" (Jt. Ex. 39 in evidence), whereby Mosher received 32,105 shares of Allied Equities Corporation stock, the value of which has been established by stipulation of all parties to this action at $1.625 per share, or a total of $52,170.62. (RT 682.) The order for the issuance of such stock referred to a stipulation entered into between Mosher and the debtor, IMI, reiterating and reserving Mosher's claims against Ward, Union, and Fluor and its sureties, and referring to this action then pending in this Court. (Plt's. Ex. 26 in evidence.) Further, Mosher in the bankruptcy proceeding advised the Referee, and the Referee had notice, of Mosher's claims and position against Ward, Union, and Fluor and its sureties and of the pendency of this action by Mosher against Ward, Union and Fluor. (Plt's. Ex. 30 in evidence, p. 4, ¶ 8, Findings of Fact, etc.)

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of all parties to this action; and it has jurisdiction of the claims asserted herein by Mosher against defendants Fluor and Sureties by virtue of 40 U. S. C. § 270b, and of the claims asserted herein by Mosher against all defendants by virtue of 28 U. S. C. § 1332.

2. Mosher is not barred or estopped from recovering from defendants in this action by reason of its prosecution of its claim in the proceedings in the matter of the bankruptcy of IMI and its acceptance of the stock issued to it on its claim.

3. Mosher had a direct contractual relationship with Union and Mosher gave Fluor the written notice required by 40 U. S. C. § 270b.

4. IMI, in all its dealings with Mosher, was authorized to and did act for and on behalf of IMI-Ward. In furnishing, fabricating, and delivering the steel for the Tucson and Vandenberg jobs pursuant to the terms and provisions of Jt. Exs. 9 and 10 in evidence, Mosher did not deal with, nor rely upon the credit of, IMI, individually, but Mosher performed pursuant to its agreement with IMI-Ward. Ward, as a member of IMI-Ward, is obligated to Mosher by reason of Mosher's performance of the terms and provisions on Mosher's part contained in Jt. Exs. 9 and 10, in the amount of $298,336.58 for steel furnished, fabricated, and delivered to the Tucson job and in the further sum of $22,716.96 for the steel furnished, fabricated, and delivered to the Vandenberg site.

5. IMI is not an indispensable party to this action.

6. Page's telephone conversation with Moore on November 15, 1961, and his telegram to Moore of the same date, together with Mosher's resulting action on November 16, 1961, and subsequently, with relation to Jt. Exs. 9 and 10 in evidence, constituted a contract and had the

legal result of obligating Union to pay Mosher directly for all sums becoming due to Mosher under the terms and provisions of Jt. Exs. 9 and 10 for furnishing, fabricating, and delivering steel to the Tucson and Vanderberg jobs. Pursuant to the terms and provisions of Jt. Exs. 9 and 10, there became due to Mosher for furnishing, fabricating, and delivering steel to the Tucson job the sum of $298,-336.58 and for furnishing, fabricating, and delivering steel to the Vandenberg job the sum of $22,716.96; and Union is liable to Mosher for these amounts.

7. The sending to Mosher of the letter mentioned in Page's telegram of November 15, 1961, was not intended by Page to be a condition precedent to Union's agreement or obligation to pay Mosher; but if it was, Union is estopped to raise the non-performance of the condition as a defense in view of the facts set out in Finding of Fact No. 44, supra.

8. In connection with Union's agreement to pay Mosher directly, Union and IMI-Ward agreed that Union might pay Mosher for its work, after acceptance of the work by IMI-Ward, and deduct Mosher's invoices from the contract price between Union and IMI-Ward. However, the existence of an indebtedness from Union to IMI-Ward against which Union might charge what it paid to Mosher was not a condition precedent to its obligation to pay Mosher.

9. Mosher fully carried out and performed each and all of its promises and agreements contained in Jt. Exs. 9 and 10 in evidence. IMI-Ward accepted Mosher's work performed under Jt. Exs. 9 and 10 and Mosher was entitled to IMI-Ward's approval for payment of Mosher's invoices for such work.

10. The assignment of invoices by IMI-Ward to United California Bank did not affect Mosher's rights against either Union or Ward.

11. No provision of the Statute of Frauds relied upon by Union herein constitutes a defense to the claims of Mosher in this action.

12. Fluor and Sureties are liable to Mosher under their payment bond executed and delivered in connection with the Davis-Monthan job in the sum of $298,336.58.

13. Defendants are entitled to credit in the amount of $52,170.62 upon their respective obligations to Mosher, that amount being the agreed value of the stock received by Mosher upon its claim in the IMI bankruptcy proceedings.

14. Mosher is entitled to judgment herein against Fluor and Sureties in the sum of $246,165.96, and against Ward and Union in the sum of $268,882.92.

15. Inasmuch as Mosher's claims against all parties are unliquidated until judgment is entered, no interest is recoverable prior to the entry of judgment herein.

ORDER FOR JUDGMENT.

The clerk is directed to forthwith enter judgment herein, as follows:

In favor of Mosher and against defendants Fluor and Sureties, and each of them, for the sum of $246,165.96, together with interest thereon at the rate of 6% per annum from date of judgment until paid.

In favor of Mosher and against defendant Ward and Union, and each of them, for the sum of $268,882.92, together with interest thereon at the rate of 6% per annum from date of judgment until paid.

In favor of Mosher and against all defendants, and each of them, for Mosher's costs of suit herein.

Dated: May 24, 1966.

JAMES A. WALSH,
United States District Judge.

UNITED STATES COURT OF APPEALS
For the Ninth Circuit.

FLUOR CORPORATION, LTD., et al., UNION TANK CAR COMPANY, WARD INDUSTRIES CORPORATION, *Appellants and Cross-Appellees,* *vs.* UNITED STATES OF AMERICA, ex rel. MOSHER STEEL COMPANY, *Appellees and Cross-Appellants.*	No. 21,307 No. 21,307 A No. 21,307 B No. 21,307 C

[January 6, 1969.]

Appeal from the United States District Court
for the District of Arizona.

Before: HAMLIN, BROWNING, and ELY, *Circuit Judges.*
BROWNING, *Circuit Judge:*

The district court rendered judgment in favor of Mosher Steel Company and against the various appellants for prices agreed to be paid for materials furnished and services rendered by Mosher in the fabrication of steel used in the construction of missile launch facilities in Arizona and California.[1] We affirm the trial court's judgment except as it denied prejudgment interest. As to this, we reverse and remand for further proceedings.

Appellants strongly attack many of the trial court's findings. We have, therefore, examined the record with

1. Prior litigation in this court arising out of these projects is reported in *Dragor Shipping Corp.* v. *Union Tank Car Co.*, 361 F. 2d 43 (1966); 371 F. 2d 722 (1967); 378 F. 2d 241 (1967).

care. We find substantial conflicts in the testimony and the documentary evidence, and even stronger differences in the construction that the parties urge should be placed on events leading to the litigation and the inferences that should be drawn from them.[2] We have not asked ourselves whether we would have resolved the conflicts and ambiguities as the trial judge did, or whether we would have drawn the same inferences. *United States* v. *Real Estate Boards,* 339 U. S. 485, 495-96 (1950). We have, however, satisfied ourselves that upon an examination of the entire evidence we are not "left with the definite and firm conviction that a mistake has been committed" in any of the trial court's findings. *United States* v. *U. S. Gypsum Co.,* 333 U. S. 364, 395 (1948); see *Commissioner* v. *Duberstein,* 363 U. S. 278, 291 (1960). We therefore accept the trial court's findings, and base the statements of fact in this opinion upon them.

Fluor Corporation, Ltd., was the prime contractor for the construction of the Arizona launch facilities, and the insurance company appellees were sureties on Fluor's performance bond. Matich Bros. and M. M. Sundt Construction Corp., who are not parties to this litigation, were the prime contractors for the California launch facilities.

Fluor and Matich & Sundt entered into separate first tier subcontracts with Union Tank & Mfg. Co.[3] Union, in turn, entered into second tier subcontracts for steel fabrication work with IMI-Ward, a joint venture created by Idaho-Maryland Industries Inc. and Ward Industries Corporation.

When IMI-Ward fell behind schedule in the performance

2. The parties are well aware of these conflicts and differences; they have explored them in great detail in their briefs. No useful purpose would be served by publishing them here.

3. Union acted principally through a division known as Graver Tank & Mfg. Co., and the trial court's findings refer to "Union" and "Graver" interchangeably.

of its subcontract, Union, on October 10 or 11, 1961 instructed an IMI-Ward official to "farm out" the steel fabricating work, and approved the selection of Mosher to perform it. Because the IMI-Ward official did not think Mosher would accept an IMI-Ward purchase order, Union agreed that if a satisfactory contract could be worked out with Mosher, Union would give Mosher a Union purchase order.

On October 13, the IMI-Ward official negotiated a detailed contract with Mosher for the required work. As anticipated, Mosher would not accept IMI-Ward's credit. The IMI-Ward official then advised Mosher that Union purchase order would be issued. On October 16, Mosher set out the agreed-upon terms in a letter addressed to the IMI-Ward official. That official signed the letter on behalf of Union and sent copies of the executed writing to Union. Mosher then began performance of the work.

Union told Mosher on October 23 that Union's purchase order would be issued within two or three weeks, and that the October 16 letter would serve as an interim purchase order until the formal purchase order could be mailed. Thereafter, on October 31, IMI-Ward asked Mosher, as a matter of accounting convenience for IMI-Ward, to change the designated customer on the job from Union to IMI-Ward, and to accept IMI-Ward purchase orders in place of those of Union. Mosher agreed, provided Union would be responsible for payment.

IMI-Ward sent Mosher two purchase orders on November 3 covering the work to be done. Mosher informed Union that completed material would not be shipped until Mosher received confirmation that Union would be responsible for payment.

On November 15, after securing IMI-Ward's approval, Union advised Mosher that Union would pay Mosher directly and deduct the payments from the amounts Union

was to pay IMI-Ward under the latter's subcontract.[4] Mosher understood, and Union intended Mosher to understand, that its commitment extended to all the work covered by IMI-Ward's purchase orders of November 3. Upon receiving Union's commitment, Mosher changed the customer's name from Union to IMI-Ward, completed the work, and delivered the fabricated steel to the job sites.

On February 2, 1962, IMI filed a voluntary petition under Chapter 11 of the Bankruptcy Act. Mosher submitted a proof of claim in these proceedings, and it was issued IMI stock under a plan of reorganization. Except for this stock, Mosher was not paid for its work.

The district court gave judgment against Union, finding that the commitment Union gave Mosher on November 15 and Mosher's completion and delivery of the work thereafter created a contract between Union and Mosher obligating Union to pay Mosher directly. Judgment was rendered against Fluor and its sureties under the Miller Act, 40 U. S. C. § 270.[5] The district court entered judgment against Ward on the ground that IMI-Ward's November 3 work orders and Mosher's fabrication and delivery of material pursuant to such orders created a contract between Mosher and IMI-Ward obligating Ward to pay Mosher in accordance with the terms and conditions of those orders.

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4. The commitment was given orally. Union told Mosher that it would be confirmed by a subsequent letter. Although the letter was prepared by Union, it was not sent because Mosher continued to make shipments without it. Union argues that the sending of this letter was intended to be condition precedent to the formation of a contract, and that the trial court's finding to the contrary is clearly erroneous. We think the finding is supported by evidence from which the trial court could conclude that the promised letter was intended to be a written confirmation of an agreement already reached. *Merritt-Chapman & Scott Corp.* v. *Gunderson Bros. Eng'r Corp.*, 305 F. 2d 659, 664-65 (9th Cir. 1962), upon which Union relies, is inapplicable for this reason.

5. Since Fluor was not involved in the California project, the judgment against Fluor and its sureties was limited to the amount due for materials used in the construction of the Arizona facilities.

Union contends that Mosher performed the work for IMI-Ward; that Union's agreement, if any, was only a guarantee to pay Mosher if IMI-Ward did not; and, being oral, this agreement to answer for the debt of another was unenforceable under the Statute of frauds.

Ward, on the other hand, contends that the only viable contract was an oral agreement between Mosher and Union arising on October 13, binding Mosher to perform the work and Union to pay for it. If there was a November agreement between Mosher and IMI-Ward, Ward argues, it required nothing of Mosher which Mosher was not already obligated to do under its October agreement with Union, and, therefore, any promise by IMI-Ward was not supported by consideration. Furthermore, the only consideration for which Mosher bargained was Union's unconditional promise to pay Mosher directly. Consequently, any promise by IMI-Ward was not bargained for and hence was unenforceable under our decision in *Colorado Nat'l Bank of Denver* v. *Boehm,* 286 F. 2d 494 (1961).

As we read the district court's findings, the court determined that *both* Union and IMI-Ward assumed direct obligations to pay Mosher for the work. IMI-Ward contracted directly with Mosher to have Mosher perform the work described in the November 3 work orders in return for payment by IMI-Ward of the prices fixed in those orders. This agreement was subject, however, to the condition precedent that Union also agree to be directly liable for payment. When Union agreed to pay Mosher, it became directly bound to Mosher. Union's promise also satisfied the condition precedent to the direct contractual obligations between IMI-Ward and Mosher.[6]

6. Ward argues that no agreement arose because Mosher rejected an element of IMI-Ward's initial offer, namely, that IMI-Ward's credit be substituted for that of Union. There was substantial evidence supporting the trial court's findings that IMI-Ward agreed to Mosher's counter-offer to accept IMI-Ward work orders and to substitute IMI-Ward for Union as the account customer if Union would agree to pay for the work.

In view of Union's obligations under its subcontract with Fluor and Matich & Sundt, Union had a substantial interest in assuring performance of the work by Mosher. As the district court found, "in agreeing to pay Mosher directly, [Union] . . . acted primarily to protect and advance its own interests under its subcontracts. . . ." Since Union's promise to pay was a direct and original undertaking rather than a collateral promise to pay IMI-Ward's debt, it was not within the Statute of Frauds, even though IMI-Ward was also obligated to pay for the work. *Holmes* v. *Suffrin,* 198 Ill. App. 45 (1916); *Peters* v. *Raven,* 159 Ill. App. 122 (1910); *Leisman & Co.* v. *Otto,* 64 Ky. (1 Bush) 225 (1866); *cf. Granite City Lime & Cement Co.* v. *Board of Educ. of School Dist. 126,* 203 Ill. App. 134 (1916). See 4 Corbin on Contracts § 926, p. 705.[7]

As to Ward's argument that any promise made by Ward to Mosher in November was without consideration, because of Mosher's pre-existing contractual obligation to perform the same work for Union, it should be noted that the district court did not conclude that a Union-Mosher contract arose in October. Even if such a prior Union-Mosher contract existed, IMI-Ward's subsequent promise would still have consideration. Under the arrangement finally agreed to, Mosher, at IMI-Ward's solicitation, undertook the additional obligation to designate IMI-Ward, rather than Union, as the customer, and to accept the IMI-Ward pur-

7. Union also contends that its commitment was limited to materials produced for use in constructing the Arizona launch facilities. Although the testimony of one witness might be read as supporting the limitation for which Union argues, as Mosher points out, there was other evidence supporting the trial court's finding that Union's commitment covered payment for all of the work Mosher was to do—whether used in construction of the Arizona facilities or those in California.

chase orders. These new undertakings were sufficient to support IMI-Ward's promise to pay.[8]

Ward's reliance upon *Colorado Nat'l Bank of Denver* v. *Boehm, supra,* 286 F. 2d 494, is also misplaced. Mosher's insistence upon a direct commitment from Union, does not mean that this was the only consideration for which Mosher bargained. Mosher also sought and obtained a promise of payment from IMI-Ward. The fact that IMI-Ward's promise alone was not enough to satisfy Mosher, or that Union's promise alone might have been sufficient, is irrelevant. *See Granite City Lime & Cement Co.* v. *Board of Educ. of School Dist. 126, supra,* 203 Ill. App. 134; *Peters* v. *Raven, supra,* 159 Ill. App. 122; Restatement of Contracts §§ 111, 113.

Ward contends that Ward is not liable even if IMI is, because the extension of credit or the delivery of goods to one member of a joint venture does not obligate the joint venture. The cases upon which Ward relies involve the assumption of liability by a joint venturer beyond the scope of his authority to act for the joint venture.[9] Here, however, the district court concluded on the basis of findings supported by substantial evidence that IMI's acts were authorized by and performed on behalf of the IMI-Ward joint venture.

Both Union and Ward argue that because Mosher filed a claim in the IMI bankruptcy proceedings representing that the amount due Mosher was an unsecured independent obligation of IMI, and because Mosher accepted a distribu-

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8. The basis for IMI-Ward's interest in these arrangements is suggested by the district court's finding that the prices which IMI-Ward had agreed to pay Mosher for the work were lower than those which IMI-Ward would collect from Union for the work.

9. *See,* for example, *Wreen* v. *Moskin,* 226 App. Div. 563, 235 N. Y. S. 405 (1929); *American Mut. Life Ins. Co.* v. *Hanna, Zabriskie & Daron,* 297 Mich. 599, 298 N. W. 296, 299 (1941); and *Matanuska Valley Bank* v. *Arnold,* 223 F. 2d 778 (9th Cir. 1955).

tion of the stock of the reorganized debtor on the basis of this claim, it is estopped from asserting that Union and Ward are liable. The result urged by Union and Ward can obtain only if it is required by some legal fiction for Mosher in its proof of claim against IMI explicitly reserved its rights against Ward, Union, Fluor, and the sureties.[10]

Thus, unlike claimant in *Eads Hide & Wool Co.* v. *Merrill*, 252 F. 2d 80 (10th Cir. 1958), which is relied on by Ward and Union, Mosher did not in the bankruptcy proceedings elect the remedy of recovery against only one of the allegedly liable parties. Moreover, Mosher did not assume different positions as to the facts in that proceeding and in this. It is not for us to say whether the decision allowing Mosher's claim in the bankruptcy proceeding was correct. We do hold that Mosher's full disclosure and express retention of rights in that proceeding precluded an estoppel against Mosher in this litigation.[11]

In addition to defending against Mosher's claim, Union filed a counterclaim alleging that if it were liable at all it would be as a surety only, and praying that Mosher be required to seek satisfaction first from Ward. In its findings and conclusions the trial court did not refer expressly to Union's counterclaim. When the omission was called to the court's attention, the court entered a judgment that

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10. Mosher's claim in the bankruptcy proceeding stated: "Claimant corporation claims that Ward Industries Corporation, as joint venturer with the Debtor, and Union Tank Car Company through its division, Graver Tank & Mfg. Co., are also liable to claimant corporation for the entire said debt, . . . Claimant corporation's filing of the claim in this proceeding is made without prejudice to its rights against the said Ward Industries Corporation, and the said Union Tank Car Company . . . In addition . . . claimant corporation has claimed that Fluor Corporation Ltd. and its sureties are liable. . . ."

11. Mosher will not obtain double recovery. In computing the amount of the judgment, the trial court deducted the stipulated value of the stock received by Mosher in the bankruptcy proceeding.

Union "take nothing by its counterclaim." Union contends that the existence of a principal-surety relationship not only was admitted in Mosher's answer to Union's counterclaim but was established by the evidence, and that, in any event, the district court erred in disposing of the counterclaim without entering findings of fact and conclusions of law as required by Fed. R. Civ. Proc. 52(a).

The purpose of Rule 52(a) is satisfied if the trial court's findings are sufficient to afford a clear understanding of the ground upon which the court based its judgment. *Seligson* v. *Roth*, ... F. 2d ..... (9th Cir. 1968). It is apparent to us that the trial court rejected Union's counterclaim because it found Union's relationship to the debt to be that of a direct obligor, not a surety. Contrary to Union's contention, Mosher did not admit in its pleadings that Union was merely a guarantor;[12] and, as we have said, the trial court's finding that Union agreed to a direct and primary obligation is not clearly erroneous.

On the basis of this finding we also reject the contention advanced by Fluor and its sureties that Mosher was not a "person having a direct contractual relationship with a subcontractor" of Fluor within the meaning of 40 U. S. C. § 270(b). We are not convinced that recognition of Mosher's claim will extend the coverage of the Miller Act beyond that intended by Congress, nor that the result will be to "impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself." *MacEvoy* v. *United States*, 322 U. S. 102, 110 (1944). Fluor could easily have protected itself by requir-

12. In its answer to Union's counterclaim, Mosher admitted that it had alleged in the complaint that Union was a surety, but Mosher also stated "the amended Complaint includes other counts and allegations as therein set forth." These "other counts and allegations" of Mosher's complaint asserted that Union was directly liable to Mosher for the debt. "A party may . . . state as many separate claims . . . as he has regardless of consistency . . . ." Fed. R. Civ. Proc. 8(e)(2).

ing appropriate security from Union. *See Hill* v. *American Surety Co.*, 200 U. S. 197, 204-05 (1906); *Mankin* v. *Ludowici-Celandon Co.*, 215 U. S. 533, 540 (1910).

We turn to Mosher's cross-appeal from the portion of the judgment which denied prejudgment interest on the amount found to be due under the contracts.

There is some disagreement among the parties as to whether the governing law is that of the state of the forum (Arizona) or of the states in which the contracts were to be performed (Arizona and California). Since there is nothing to indicate that the relevant law of the two states differs, we have not concerned ourselves with the problem. The California rule is stated in section 3287, California Civil Code, "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . . " Arizona follows the same general rule.[13]

Cross-appellees argue that Mosher's damages were not "certain or capable of being made certain by calculation" prior to judgment because of the disputed value of the IMI stock which Mosher received in partial payment of its

13. The California statute was enacted in 1872, and states the common-law rule. Restatement, Contracts § 337(a). Arizona has not codified the rule, but it is followed by the courts of that state. *United States Fidelity & Guar. Co.* v. *California-Arizona Const. Co.*, 21 Ariz. 172, 186 Pac. 502, 509 (1920); *Palmcraft Dev. Co.* v. *Phoenix*, 46 Ariz. 400, 51 P. 2d 921 (1935); *Schwartz* v. *Schwerin*, 85 Ariz. 242, 250, 336 P. 2d 144, 149 (1959); *Feighner* v. *Clarke*, 2 Ariz. App. 286, 408 P. 2d 219, 222-23 (1965), *vacated on other grounds*, 101 Ariz. 334, 419 P. 2d 513 (1966) (in banc); *Betz* v. *Goff*, 5 Ariz. App. 404, 406, 427 P. 2d 538, 540 (1967).

A recent addition to the California statute provides that where an unliquidated contract claim is involved interest may be awarded, in the court's discretion, for some or all of the period between the filing of suit and entry of judgment. Calif. Stats. 1967, ch. 1230, § 1.

claim in the IMI bankruptcy proceedings. The dispute over the stock's value was not resolved until the parties stipulated to its worth during the course of trial.[14]

Clearly, this circumstance did not render the amount of Mosher's claim uncertain until it arose. At a minimum, therefore, Mosher was entitled to prejudgment interest on the whole amount owing under the contracts from the date it became due (thirty days after February 28, 1962) to the date Mosher received the stock in partial payment.

It is equally apparent that Mosher was not entitled to interest after the latter date upon the portion of his claim which had been paid. But uncertainty about the precise value of the partial payment should not bar Mosher from compensation for the continued loss of the use of the much larger balance remaining unpaid. Interest on the difference between the amount due Mosher under the contracts and the value of the stock as determined at trial should be allowed from the date the stock was received to the date of judgment. Although we have found no decisions directly on point, this result is supported by analogous authorities.

Thus, even though the existence of an unliquidated counterclaim or set-off necessarily puts the amount payable in doubt, it is well settled that it does not render the claim itself uncertain or deprive the claimant of the right to

14. Cross-appellees also intimate that Mosher should be denied pre-judgment interest because the issue of liability was disputed. The generally accepted rule is that uncertainty as to liability, as distinguished from uncertainty as to the amount of the damage, does not bar recovery of prejudgment interest. Restatement, Contracts § 337(a), comment d. Despite disputed liability, prejudgment interest was awarded in both *Feighner* v. *Clarke*, 2 Ariz. App. 286, 408 P. 2d 219, 222-23 (1965), *vacated on other grounds*, 101 Ariz. 334, 419 P. 2d 513 (1966) (in banc); and *Betz* v. *Goff*, 5 Ariz. App. 404, 406, 427 P. 2d 538, 540 (1967). California cases to the same effect are collected in 5 U. C. L. A. L. Rev. 262, 266 n. 28 (1958).

prejudgment interest.[15] If the unliquidated set-off or counterclaim is based upon a breach unrelated to the sum due under the primary claim, interest is allowed on the entire claim. The amount of the counterclaim or set-off as determined at trial is then deducted from this total. If, as in the present case, the unliquidated set-off or counterclaim constitutes a partial payment of the primary claim, interest is allowable on the balance due after deducting the amount of the set-off or counterclaim as determined at trial.[16]

The result we reach is also supported by the principle recently applied in *Coleman Eng'r Co.* v. *North American Aviation,* 55 Cal. Rep. 1, 420 P. 2d 713 (1967). There, defendant argued that prejudgment interest was barred because a lesser amount of damages was awarded than plaintiff had originally demanded. The reduced claim resulted from the plaintiff's successful efforts in obtaining settlements with third persons and in salvaging materials. The Supreme Court of California held that under these circumstances uncertainty as to the amount due did not bar an award of prejudgment interest. It stated, "we are satisfied

15. *Hansen* v. *Covell,* 218 Cal. 622, 631-32, 24 P. 2d 772, 775, 89 A. L. R. 670 (1933) (in banc); *McCowen* v. *Pew,* 18 Cal. App. 482, 483 *et seq.,* 123 Pac. 354, 355-56; *Hunt Foods* v. *Phillips,* 248 F. 2d 23, 26-27 (9th Cir. 1957) (Calif.). Other California decisions are collected in 14 Cal. Jur. 2d 79, 705-06, and 5 U. C. L. A. L. Rev. 262, 268, n. 37 (1958). *See also Mall Tool Co.* v. *Far West Equip. Co.,* 45 Wash. 158, 273 P. 2d 652, 663 (1954); *Sam Macri & Sons, Inc.* v. *United States,* 313 F. 2d 119, 129-30 (9th Cir. 1963); *American Sur. Co.* v. *United States,* 368 F. 2d 475, 479-80 (9th Cir. 1966); 5 Corbin, Contract § 1046, p. 286, § 1051, pp. 305-06.

"In short," Professor McCormick states, "it is the character of the claim and not of the defense that is determinative of the question whether an amount of money sued for is a 'liquidated sum.'" McCormick on Damages, § 54 p. 216 (1935).

16. *Hansen* v. *Covell,* 218 Cal. 622, 631-32, 24 P. 2d 772, 775-76 (1933) (in banc); *Hunt Foods* v. *Phillips,* 248 F. 2d 23, 26-27 (9th Cir. 1957) (Calif.); and cases collected at 14 Cal. Jur. 2d § 79, pp. 705-06.

that reductions in damages due to plaintiff's efforts to mitigate damages should not preclude an award of prejudgment interest. If the rule were otherwise, a plaintiff might be encouraged to forego opportunities to mitigate damages so as not to jeopardize his right to prejudgment interest." Similarly, Mosher's right to prejudgment interest should not be denied because Mosher in seeking and obtaining partial payment from a joint obligor reduced the amount of its claim against cross-appellees.

The judgments are affirmed on the appeals and reversed for further consideration on the cross-appeal.

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

U. S. Court of Appeals and Post Office Building

7th & Mission Streets, P. O. Box 547

San Francisco, California 94101

Jan 6 1969

Re: No. 21307, Fluor Corporation, Ltd., et al.
v. USA, ex rel. Mosher Steel Co.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered affirming and reversing on cross-appeal the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

WILLIAM B. LUCK,
Clerk of Court.

UNITED STATES COURT OF APPEALS
for the Ninth Circuit.

FLUOR CORPORATION, LTD., et al.,
UNION TANK CAR COMPANY, WARD INDUSTRIES CORPORATION,
Appellants and Cross-Appellees,
vs.
UNITED STATES OF AMERICA, ex rel. MOSHER STEEL COMPANY,
Appellees and Cross-Appellants.

Filed Feb. 11, 1969
Wm. B. Luck, Clerk

No. 21,307
No. 21,307 A
No. 21,307 B
No. 21,307 C

ORDER.

Before: HAMLIN, BROWNING, and ELY, *Circuit Judges.*

The petitions for rehearing are denied.

Judge Ely has become convinced that we may have been mistaken in overturning that portion of the district court's judgment which disallowed prejudgment interest and would therefore, on that issue, grant the cross-appellees' petitions for rehearing.